No. 92-344

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

MCNARY,

Petitioner,

vs.

HAITIAN CENTERS COUNCIL, INC.

Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Second Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN
IMMIGRATION LAWYERS ASSOCIATION AND THE
IMMIGRATION CLINIC OF THE AMERICAN
IMMIGRATION LAW FOUNDATION
IN SUPPORT OF RESPONDENT

GERALD L. NEUMAN
435 West 116th Street
New York, NY 10027
(212) 854-2550

Attorneys for Amici Curiae

ISSUE PRESENTED

WHETHER JUDICIAL REVIEW OF THE LEGALITY OF PETITIONERS' PRACTICE OF FORCIBLY REPATRIATING HAITIAN REFUGEES INTERDICTED ON THE HIGH SEAS IS PRECLUDED BY THE IMMIGRATION AND NATIONALITY ACT

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STATEMENT OF INTEREST OF AMICI

Amicus AMERICAN IMMIGRATION LAWYERS ASSOCIATION is a national association of lawyers and law school professors who practice and teach in the fields of immigration and nationality law.[1] AILA has as its objectives, to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence therein; to promote reforms in the laws with regard thereto, and to facilitate the administration of justice therein; and to elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration, nationality and naturalization matters.

Amicus LEGAL ACTION CENTER of the American Immigration Law Foundation (AILF) is a non-profit advocacy and litigation program of AILF, an immigration bar foundation. The mission of the AILF Legal Action Center is to represent the public interest in the fair and just administration of immigration and nationality laws and related laws and policies in order to foster family unification, insure fundamental fairness, and promote economic growth in a pluralistic society.

The petition before this Court involves fundamental questions regarding the rule of law in the immigration field and the denial of basic human rights. The Government's arguments against reviewability of its actions, which is the sole issue addressed in this Brief, involve broad claims of preclusion of review that would have serious consequences for immigration practice and for the fair administration of the laws.

Amici have a direct and serious interest in the development of the immigration law and in the case now before this Court. The familiarity of Amici with the administration of justice in the immigration field lead Amici to believe that this Court would benefit from additional written argument with respect to the

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[1] Letters from counsel to the parties, consenting to the submission of this brief, have been filed with the Clerk.

availability of judicial review for aliens outside the United States generally, as well as for the Respondents in this case.

SUMMARY OF ARGUMENT

Administrative action under the Immigration and Nationality Act of 1952 (INA) is subject to the usual strong presumption in favor of judicial review. Nineteenth-century doctrines disfavoring judicial review of immigration decisions were superseded by the enactment of the Administrative Procedure Act of 1946 (APA) and the INA.

The Government fails in its efforts to overcome this presumption by divining a congressional intent to preclude judicial review at the behest of aliens outside the United States. The particular features of the INA on which the Government relies -- INA § 106 and the doctrine of consular nonreviewability -- create particular, narrow exceptions to the general rule of reviewability, and are not even specifically aimed at a category of "aliens outside the United States." These exceptions do not somehow combine to express a general congressional intent to preclude review. Furthermore, courts do in fact afford judicial review to aliens outside the United States in appropriate situations.

Nor do Respondents lack standing to seek judicial review. There is no general rule denying aliens outside the United States standing to sue. Courts in immigration cases have evolved a prudential standing rule that limits the occasions on which aliens lacking connection to the United States may challenge the denial of immigration benefits. But these prudential considerations weigh in favor of reviewing Petitioners' practice of returning Haitian refugees captured on the high seas -- not merely denying them "entry" to the United States. The standing of those Respondents who have previously been detained at Guantanamo Bay Naval Base and wrongfully repatriated to Haiti is even stronger.

Finally, Petitioners cannot recast their own violations of the INA as unreviewable actions of the President. Immigration enforcement measures based on delegated authority under INA §§ 212(f) and 215 are fully subject to judicial review.

ARGUMENT

I. THE STRONG PRESUMPTION IN FAVOR OF JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IS FULLY APPLICABLE TO DECISIONS UNDER THE IMMIGRATION LAWS

This Court has recently confirmed that "[t]he strong presumption in favor of judicial review of administrative action" applies equally to the administration of the Immigration and Nationality Act of 1952 (INA). McNary v. Haitian Refugee Center, Inc., 111 S. Ct. 888, 899 (1991). The Court declined, "given the absence of clear congressional language mandating preclusion," id. at 892, to read a restriction on judicial review of individual adjudications as precluding a systemic challenge to unlawful INS procedures. The Government's arguments again fail to overcome this presumption in the present case.

The enactment of the APA and the INA worked a major change in the approach to judicial review in immigration law. See 3 C. Gordon & S. Mailman, Immigration Law & Procedure § 81.01[2] (1992) [hereinafter cited as Gordon & Mailman]. Immigration was one of the first fields of federal government regulation, and pre-APA immigration law preserved features characteristic of this early stage. This Court announced in the nineteenth century that Congress could make an executive officer "the sole and exclusive judge of the existence of those facts [on which an alien's right to enter depends], and no other tribunal, unless expressly authorized by law to do so, is at liberty to reexamine or controvert the sufficiency of the evidence on which he acted." Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892). As a result of this maxim, immigration law did not receive the benefit of the presumption of reviewability that this Court later evolved, until Congress itself codified the presumption of reviewability in the Administrative Procedure Act of 1946. In the meantime, judicial review of most immigration decisions was

limited to the review authorized by the habeas corpus statute.[2]

The INA was enacted in 1952 as a comprehensive reconfiguration of the immigration laws. 1 Gordon & Mailman § 2.03. Section 279 of the Act, 8 U.S.C. § 1329, conferred on the district courts jurisdiction of all causes, civil and criminal, arising under any of the immigration provisions, §§ 201-292, 8 U.S.C. §§ 1151-1362. 3 Gordon & Mailman § 81.05[1], at 81-55 to 81-56.

This Court explained the relationship between the judicial review provisions of the APA and the INA in Shaughnessy v. Pedreiro, 349 U.S. 48, 50-52 (1955). Section 12 of the APA, 5 U.S.C. § 559, provides that subsequent legislation shall not supersede or modify the APA unless it "shall do so expressly." The enactment of the INA in 1952 constituted subsequent legislation, and therefore the modern principles of administrative law, as embodied in the APA, took root in immigration law except to the extent that Congress expressly excluded them. Ambiguous references to finality that had been taken as precluding judicial review under the Immigration Act of 1917 could not be sufficient to preclude judicial review under the INA. A nonpreclusive interpretation was "more in harmony with the generous review provisions of the Administrative Procedure Act." 349 U.S. at 51. The Court also noted that Senator McCarran and Representative Walter, the sponsors of both the APA and the INA, had assured Congress of the applicability of APA review to the INA.

As Justice Scalia recently observed, the reasoning in Pedreiro "remains the law," although the precise result in Pedreiro (review of deportation orders by suit for injunction) was expressly superseded by statute. INS v. Doherty, 112 S. Ct. 719, 728 n.1 (1992) (Scalia, J., concurring in part and dissenting in part).

In a simple employment-based immigration case, beginning with the employer's application to the Department of Labor for labor certification, followed by a visa petition to the INS to

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[2] Even in Nishimura Ekiu, the Court made clear that an alien denied entry was restrained of his liberty, and could test the lawfulness of the restraint by writ of habeas corpus. 142 U.S. at 660.

classify the employee as an eligible immigrant, followed by the employee's application for a visa at a consulate abroad, and ending with the employee's arrival at the border for admission or exclusion, denial at any step is a reviewable agency action, except for a consular visa denial, which is subject to a special rule discussed in Part II(B) infra. See, e.g., Digilab, Inc. v. Secretary of Labor, 495 F.2d 323 (1st Cir.), cert. denied, 419 U.S. 840 (1974); (denial of labor certification); Taneja v. Smith, 795 F.2d 355 (4th Cir. 1986) (denial of visa petition); 8 U.S.C. § 1105a(b) (exclusion). The complexity of the immigration laws multiplies the occasions for judicial review, as the leading immigration treatise observes:

> Virtually every immigration determination is now subject to the limited judicial review previously described in this chapter. Thus review proceedings can be brought to question such matters as the following: denials of visa petitions, registry, benefits under the agricultural workers program, waivers for exchange visitors, denial of parole to entry applicant, of approval for a school qualified to accept nonimmigrant students, or withdrawal of such approval, change from one nonimmigrant status to another, denial of a labor certifications, improper seizure or retention of the alien's passport, denial of extension of temporary stay, or of asylum claim, refusal to grant extended voluntary departure, imposition of administrative fine, revoking employment authorization, eligibility for legalization, claim of arbitrary, discriminatory, and unconstitutional action in bringing deportation proceeding when prosecutorial discretion usually exercised to withhold deportations in similar cases, exclusion from a list of companies authorized to conduct immigration medical examinations, breach of immigration bond, denial of advance parole, and adjustment of status.

3 Gordon & Mailman § 81.11[4], at 81-186 to 81-192 (footnotes omitted).

II. THE INA DOES NOT EXPRESS, CLEARLY OR OTHERWISE, AN INTENT TO PRECLUDE JUDICIAL REVIEW OF RESPONDENTS' CLAIMS

The Government argues that the strong presumption of reviewability is overcome in this case because the INA expresses a congressional intention to deny judicial review to some category of aliens that includes the Respondents. The Government never makes clear precisely what category of aliens Congress intended to exclude from judicial review -- for example, aliens who are not permanent residents, aliens who have never been in the United States, aliens outside the United States when an otherwise reviewable action occurs, or aliens outside the United States when they file an action seeking judicial review. In fact, the supposed evidence of this congressional intent points in different directions, and amounts to nothing more than particular exceptions to the normal presumption of judicial review.

Initially, the Government's argument should be put in context by observing that the same method of reasoning could be used to prove that the INA expresses a congressional intention to deny judicial review to United States citizen employers or spouses of aliens. They cannot seek judicial review of exclusion or deportation orders, because the alien can adequately represent his own interests, see, e.g., Garcia v. Boldin, 691 F.2d 1172, 1182 (5th Cir. 1982); they cannot seek judicial review of consular visa denials because no one can. Yet this hardly demonstrates a generalizable congressional intent to bar citizen employers and spouses from seeking judicial review. See, e.g., Pesikoff v. Secretary of Labor, 501 F.2d 757 (D.C. Cir. 1974), cert. denied, 419 U.S. 1038 (1974); Friedberger v. Schultz, 616 F. Supp. 1315 (E.D. Pa. 1985); 3 Gordon & Mailman § 81.11[4] at 81-195.

A. INA § 106 Provides No Evidence of a General Congressional Intent to Preclude Judicial Review of Matters Outside Its Scope

Section 106 of the INA, 8 U.S.C. § 1105a, sets forth the

exclusive means for judicial review of final orders of exclusion and deportation entered against individual aliens. Since the Government insists that interdiction is neither exclusion nor deportation, and since the Respondents in this case do not seek review of their nonrefoulement claims on individual grounds, the exclusivity of § 106 is doubly irrelevant. But the Government's argument is broader: that the exclusivity of § 106 implies the unavailability of judicial review for agency actions entirely outside the context of exclusion or deportation proceedings. An examination of the INA as a whole yields no such conclusion.

Section 106 was inserted in the INA at a later date. Pub. L. 87-301, § 5(a), Sept. 26, 1961, 75 Stat. 641. The 1961 Act was the first express provision regarding judicial review in the immigration laws. See 3 Gordon & Mailman § 81.01[2], at 81-6. Its purpose was to remedy specific abuses. The amendment was motivated by frustration with the opportunities for delay created by the broad menu of remedial options in exclusion and deportation cases, particularly those involving deportation of criminal and subversive aliens. Cheng Fan Kwok v. INS, 392 U.S. 206, 214 (1968); Foti v. INS, 375 U.S. 217, 224-25 (1963); H.R. Rep. No. 1086, 87th Cong., 1st Sess. (1961), reprinted in [1961] U.S. Code, Cong. & Ad. News 2950, 2967. Section 106 carved out two exceptions to the general rule of district court review under the APA. First, final orders of deportation were to be reviewed only by petition in the courts of appeals, unless the alien was held in custody. The purpose of this change was to facilitate timely enforcement of deportation by eliminating duplicative review in the trial and appellate courts, and consolidating all the issues that arose in the deportation hearing, with res judicata effect, in one review proceeding. Foti, 375 U.S. at 312-13. Second, exclusion orders were to be reviewed only on habeas corpus, and with res judicata effect. This change was intended to take advantage of the expeditious procedures for deciding habeas cases, and to channel review of exclusion cases away from the District of Columbia. H.R. Rep. No. 1086, [1961] U.S. Code, Cong. & Ad. News at 2976-77. The limitation to habeas review of exclusion orders put pressure on aliens excluded

at land borders to acquiesce in their exclusion, because they could achieve judicial review only by surrendering into custody. See id. at 2974; Brownell v. Tom We Shung, 352 U.S. 180, 183 (1956) (declaratory judgment method permitted alien to avoid "odium of arrest and detention); 3 Gordon & Mailman § 81.04[1][c].

Section 106(c) further provides that, in both deportation and exclusion cases, there shall be no judicial review if the alien departs from the United States after the issuance of the order. This limit reflects the traditional rule that an alien who voluntarily departs while under an order of deportation has executed the order and abandoned the appeal, see Mrvica v. Esperdy, 376 U.S. 560 (1964) (explaining the rule); Chen v. INS, 418 F.2d 209 (8th Cir. 1969).[3] It also permits the government to achieve expeditious and lasting deportation of aliens who delay in seeking judicial review.

Section 106(c) has been construed narrowly according to its language and purpose. Deportation in violation of the automatic stay that attaches under § 106(a)(3) when the petition for review is served on the INS does not defeat jurisdiction. See, e.g., Hernandez-Ortiz v. INS, 777 F.2d 509 (9th Cir. 1985). An alien who has already departed the country can seek judicial review when the INS insists on having an exclusion order entered against him after his departure, since § 106(c) does not address this converse situation. Lesbian/Gay Freedom Day, Inc. v. U.S. INS, 541 F. Supp. 569, 574-75 (N.D. Cal. 1982), aff'd sub nom. Hill v. U.S. INS, 714 F.2d 1470 (9th Cir. 1983). Moreover, some courts have held that a deportation prior to the filing of the petition does not preclude judicial review if it was illegally executed. E.g., Mendez v. INS, 563 F.2d 956 (9th Cir. 1977); but see Umanzor v. Lambert, 782 F.2d 1299 (5th Cir. 1986)

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[3] The House Report says only: "In an effort to curtail, if not to eliminate repetitious and unjustified appeals to courts for interference with the enforcement of deportation orders, the section declares that an order of deportation or of exclusion shall not be reviewed by a court if the alien has not exhausted his administrative remedies, or if he has departed from the United States." H.R. Rep. No. 1086, [1961] U.S. Code, Cong. & Ad. News at 2971-72.

(criticizing Mendez); cf. United States v. Mendoza-Lopez, 481 U.S. 828, 837 & n.13 (1987) (correctness of Mendez open).

Thus § 106 was intended to simplify the methods of judicial review of final deportation and exclusion orders, and to bar repeated review. To describe the resulting set of rules as targeted against aliens "outside the United States," let alone as expressing a general policy of precluding judicial review for such aliens, misconceives both its purpose and its effect.[4]

It should also be emphasized that the exclusivity of § 106 relates only to final orders of deportation and exclusion. This Court made clear in Cheng Fan Kwok v. INS, 392 U.S. 206, 210 (1968), that determinations outside the scope of the deportation hearing remain subject to the usual forms of APA review. "In situations to which the provisions of § 106(a) are inapplicable, the alien's remedies would, of course, ordinarily lie first in an action brought in an appropriate district court." Class actions challenging general agency practices are among those situations. See, e.g., INS v. National Coalition for Immigrants' Rights, 112 S. Ct. 551 (1991); Campos v. Nail, 940 F.2d 495 (9th Cir. 1991); Etuk v. Slattery, 936 F.2d 1433 (2d Cir. 1991); Ayuda, Inc. v. Attorney General, 848 F.2d 1297 (D.C. Cir. 1988).

The Government's claimed contrast between § 106 and § 207 (8 U.S.C. § 1157), the overseas refugee provision, is meaningless. Of course, § 207 "does not provide for either administrative or judicial review," Brief for Petitioners at 15 (emphasis deleted). Few substantive provisions of the INA do. The asylum provision, § 208, does not provide for administrative or judicial review either; nor does the status adjustment provision

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[4] The Government cites Cobb v. Murrell, 386 F.2d 947 (5th Cir. 1967), and Braude v. Wirtz, 350 F.2d 702 (9th Cir. 1965), which viewed § 106 as relevant to whether aliens outside the United States could seek review of a Labor Department decision that would bar their entry. Both rely on a pre-APA presumption that an immigration decision is not reviewable unless Congress expressly so provides, and on the now-superseded rule that standing requires violation of a legal right. They are historically interesting, but provide no reasoned support for the argument.

for refugees and asylees in the United States, § 209. The review the courts afford with respect to these provisions results from the application of general principles of administrative law, including exhaustion, finality, and the availability of declaratory and injunctive relief against patterns of violation of statutory rights. See, e.g., Montes v. Thornburgh, 919 F.2d 531 (9th Cir. 1990) (asylum applicants challenging pattern of procedural violations).

The Government places great weight on a sentence of dictum contained in a footnote in one of the cases that prompted § 106, Brownell v. Tom We Shung, 352 U.S. 180 (1956). In that case, this Court had endorsed declaratory judgment proceedings as an alternative to habeas corpus review of exclusion decisions. The Court then added, "We do not suggest, of course, that an alien who has never presented himself at the borders of this country may avail himself of the declaratory judgment action by bringing the action from abroad." Id. at 184 n.3. In context, however, that sentence obviously refers to a requirement of exhaustion of administrative remedies. The dispute over the alien's excludability was to be presented to the district court as a review of findings of the Special Inquiry Board (the predecessor of the current Immigration Judge), not as an opportunity for factfinding in the first instance, jumping over the statutory process for inspection of arriving immigrants.[5] The Court surely did not foresee, and was not addressing, the case of refugees who have no administrative remedies to exhaust because they face summary repatriation after capture on the high seas, under a procedure that has no statutory basis and that violates an express statutory prohibition.

B. The Doctrine of Consular Nonreviewability Does Not Provide Evidence of a General Congressional Intent to Preclude Aliens Outside the United States From Seeking Judicial Review

[5] In context, the footnote would not be an allusion to the consular nonreviewability doctrine, because the statute under which Tom We Shung applied waived the requirement of a consular visa. See Act of Dec. 28, 1945, ch. 591, § 1, 59 Stat. 659.

The Government invokes the much-criticized doctrine of the nonreviewability of consuls' decisions denying visas, which has generally been considered a historical anomaly,[6] as if it formed part of the mainstream pattern of the INA. That doctrine is ill-suited to support the Government's argument that the INA wholly precludes judicial review at the behest of aliens outside the United States, in three major respects: first, the doctrine is a historical exception with a specific statutory basis limited to consular officers; second, the doctrine applies only to individual exercises of consular discretion, not to challenges to generally applicable rules that guide consular discretion; and third, the doctrine does not target overseas aliens, but rather anyone seeking to challenge an individual consular visa denial.

1. This Court has never endorsed the consular nonreviewability exception, and so has had no occasion to describe its history. Consular visas were first made a prerequisite for seeking admission to the United States during World War I, and Congress continued this requirement thereafter. 1 Gordon & Mailman § 8.01, at 8-3. In those pre-APA years, the courts adhered to the view that habeas corpus was the only authorized vehicle for review of immigration decisions. But the consul's denial of a visa did not itself place an alien in custody, and so habeas would not lie.

The consular nonreviewability doctrine arose in the 1920's, when lower federal courts rejected alternative methods of attacking the consul's decision. The seminal cases were United States ex rel. London v. Phelps, 22 F.2d 288 (2d Cir. 1927), cert. denied, 276 U.S. 630 (1928) (alien who came to border without a visa could not make her exclusion hearing a vehicle for challenging visa denial), and United States ex rel. Ulrich v. Kellogg, 30 F.2d 984 (D.C. Cir.), cert. denied, 279 U.S. 868 (1929) (citizen husband could not compel consul by mandamus to

[6] The literature is summarized in James A.R. Nafziger, Review of Visa Denials by Consular Officers, 66 Wash. L. Rev. 1 (1991) (based on a report prepared for the Administrative Conference of the United States). See also 3 Gordon & Mailman § 81.11[2].

issue a visa to his wife). The latter court observed, "We are not able to find any provision of the immigration laws which provides for an official review of the action of the consular officers in such case by a cabinet officer or other authority." Id. at 986.

The mystery is how the consular nonreviewability doctrine survived the passage of the APA and the recodification of the immigration laws in 1952. The courts that have confronted this issue generally identify Sections 104(a) and 221(a) of the INA, 8 U.S.C. §§ 1104(a), 1201(a) as the modern statutory basis for precluding review. Those sections assign visa issuance functions to consular officers, and expressly except from the Secretary of State's supervisory responsibility "those powers, duties, and functions conferred upon the consular officers relating to the granting or refusal of visas." 8 U.S.C. § 1104(a). Courts have extrapolated from this rejection of administrative review a preclusion of judicial review of individual visa denials.[7]

Since the doctrine of consular nonreviewability has an idiosyncratic origin based on the noncustodial, visa-issuing functions of consuls and a perceived congressional intent to shield them from supervision, that doctrine has no relevance to the capture of refugees on the high seas and their forcible repatriation to Haiti by Coast Guard and INS personnel.

2. The consular nonreviewability doctrine focuses on the

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[7] See, e.g., City of New York v. Baker, 878 F.2d 507, 512 (D.C. Cir. 1989); Li Hing of Hong Kong, Inc. v. Levin, 800 F.2d 970, 971 (9th Cir. 1986); Loza-Bedoya v. INS, 410 F.2d 343, 347 (9th Cir. 1969); Kummer v. Shultz, 578 F. Supp. 341 (N.D. Tex. 1984); Ubiera v. Bell, 463 F. Supp. 181, 184 (S.D.N.Y. 1978); Hermina Sague v. United States, 416 F. Supp. 217 (D.P.R. 1976); Licea-Gomez v. Pilliod, 193 F. Supp. 577, 582 (N.D. Ill. 1960).

Some courts have also seen support for the consular nonreviewability doctrine in this Court's decision in Kleindienst v. Mandel, 408 U.S. 753 (1972). Consular nonreviewability, however, was never mentioned in Mandel, and the Court did review on the merits the Attorney General's refusal to waive a ground of exclusion so that Mandel could receive a visa. See 408 U.S. at 759, 769.

individual exercises of discretion by consuls, and does not preclude judicial review of the systematic practices that structure the visa issuance function itself. The APA makes those practices reviewable, and the lower federal courts have reviewed them. See Mulligan v. Schultz, 848 F.2d 655 (5th Cir. 1988) (aliens can seek review of State Department's choice of starting point for visa priority dates); Ventura-Escamilla v. INS, 647 F.2d 28 (9th Cir. 1981) (aliens may challenge State Department regulation by which consular officials determine priority dates, but not consul's factual determination of date of receipt); Contreras de Avilia v. Civiletti, 643 F.2d 471 (7th Cir.), cert. denied, 454 U.S. 860 (1981) (aliens may challenge State Department's allocation of visas issued during transition period to quota); Silva v. Bell, 605 F.2d 978 (7th Cir. 1979) (aliens denied visas as result of State Department's erroneous quota calculation entitled to judicial review and reallocation of visas); Angco v. Haig, 514 F. Supp. 1328 (E.D. Pa. 1981) (aliens can seek review of State Department's refusal to prorate visa allotment for oversubscribed nation); see also Martinez v. Bell, 468 F. Supp. 719 (S.D.N.Y. 1979) (citizen children whose parents were denied visas may challenge constitutionality of statute repealing their priority status); Fiallo v. Levi, 406 F. Supp. 162 (E.D.N.Y. 1975) (three-judge court) (alien may challenge constitutionality of statute on which visa denial was based), aff'd on the merits sub nom. Fiallo v. Bell, 430 U.S. 787 (1977). Thus the consular nonreviewability doctrine does not, even by the most distant analogy, suggest any obstacle to review of the Petitioners' practice of forcibly repatriating Haitian refugees.

3. The Government invokes the consular nonreviewability doctrine as if it were a doctrine dealing specifically with the rights of aliens located overseas. From the doctrine's inception, however, it has applied regardless of the alien's location, and regardless of the identity of the plaintiff. The London case involved an alien in exclusion proceedings in Vermont; the Ulrich case was brought in the District of Columbia by the alien's citizen husband. Later applications have continued to bar review of consular decisions at the behest of visa applicants who are already

in the United States, see, e.g., Ventura-Escamilla v. INS, 647 F.2d 28 (9th Cir. 1981); Burrafato v. United States Department of State, 523 F.2d 554 (2d Cir. 1975), cert. denied, 424 U.S. 910 (1976), or at the behest of citizen or permanent resident alien spouses, parents or children of the rejected applicant, see, e.g., Wan Shih Hsieh v. Kiley, 569 F.2d 1179 (2d Cir.) (permanent resident father), cert. denied, 439 U.S. 828 (1978); Hermina Sague v. United States, 416 F. Supp. 217 (D.P.R. 1976) (citizen wife); see also Li Hing of Hong Kong, Inc. v. Levin, 800 F.2d 970 (9th Cir. 1986) (domestic employer).

Just as it would be erroneous to equate review of consular decisions with review at the behest of aliens outside the United States, so would it be erroneous to equate decisions made by consuls with decisions made outside the United States. The INS itself has offices in numerous foreign cities where officers are empowered to make decisions, including grant or denial of visa petitions and waivers of grounds of excludability, many of which are then subject to administrative and judicial review. See 8 C.F.R. §§ 3.1(b), 103.1(f)(2), 103.1(o)(2) (granting this authority to Athens, Bangkok, Frankfurt, Guadalajara, Hong Kong, Manila, Mexico City, Monterrey, New Delhi, Panama City, Rome, Seoul, Singapore, and Vienna offices), 103.3; Matter of Darwish, 14 I. & N. Dec. 307 (BIA 1973); Matter of H---, 14 I. & N. Dec. 185 (Reg. Comm'r 1972); Matter of Allison, 12 I. & N. Dec. 835 (BIA 1968); 1 Gordon & Mailman § 3.03[5].

C. The Lower Courts Have Recognized That Aliens Outside the United States are Not Necessarily Precluded From Judicial Review

The Government's effort to extrapolate a general rule of preclusion from two idiosyncratic data points also founders on the fact that courts have recognized that the INA and the APA do permit aliens outside the United States to seek judicial review of immigration decisions affecting them. While some of these cases involve unusual circumstances, they are appropriate precedents for the unusual situation currently before this Court.

Amici will discuss the principles behind these cases infra, in an analysis of standing, because the courts that afford or deny judicial review to aliens outside the United States are applying prudential standing rules of their own creation, rather than any statutory rules of preclusion provided by Congress. It should suffice here to note the existence of cases permitting aliens outside the United States to seek judicial review of decisions of the immigration authorities. Some of these cases involve aliens outside the United States who have previously been in United States territory,[8] while others involve aliens who have never been in United States territory.[9] Respondents in the present case

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[8] See Polovchak v. Meese, 774 F.2d 731 (7th Cir. 1985) (parents who have departed United States can challenge departure control order interfering with their custody of child who remained); Jaimez-Revolla v. Bell, 598 F.2d 243 (D.C. Cir. 1979) (deported alien can challenge Attorney General's denial of permission to apply for readmission); Estrada v. Ahrens, 296 F.2d 690, 694 (5th Cir. 1961) (alien who took temporary trip abroad while awaiting decision on admission could challenge INS refusal to permit him to return and complete proceeding); Guirola-Beeche v. U.S. Department of Justice, 662 F. Supp. 1414 (S.D. Fla. 1987) (alien who voluntarily departed United States can challenge subsequent forfeiture of his delivery bond); Lesbian/Gay Freedom Day, Inc. v. U.S. INS, 541 F. Supp. 569, 574-75 (N.D. Cal. 1982) (alien can seek judicial review of exclusion order entered after his departure), aff'd sub nom. Hill v. U.S. INS, 714 F.2d 1470 (9th Cir. 1983); see also Catholic Social Services, Inc. v. Meese, 664 F. Supp. 1378 (E.D. Cal. 1987) (granting preliminary injunction to aliens outside United States eligible to apply for SAW legalization under 8 U.S.C. § 1160); Catholic Social Services, Inc. v. Thornburgh, 956 F.2d 914 (9th Cir. 1992) (affirming on the merits denial of permanent injunction to class of aliens outside United States wishing to apply for legalization under 8 U.S.C. § 1255a), cert. granted sub nom. Barr v. Catholic Social Services, Inc., 112 S. Ct. 2990 (1992).

[9] See Johns v. Department of Justice, 653 F.2d 884 (5th Cir. 1981) (alien mother outside United States who seeks return of her child is entitled to participate in action for judicial review of child's deportation); Contreras de Avilia v. Civiletti, 643 F.2d 471 (7th Cir.), cert. denied,

include both categories. One special class of cases, whose correctness this Court has not resolved, involves the Mendez doctrine that INA § 106(c) does not preclude judicial review of deportation orders when the deportation was illegally executed before the alien sought judicial review.[10]

As all of these cases indicate, the INA does not express, clearly or otherwise, a congressional intention that aliens outside the United States be precluded from seeking judicial review in all cases. Nor does it express a congressional intention to preclude judicial review in the present case, involving a procedure never contemplated by Congress.

III. PRUDENTIAL STANDING RULES DO NOT BAR THE ACTION

The Brief Amicus Curiae of the Federation for American Immigration Reform openly champions a contention that hovers in the margins of the Government's argument: that aliens outside the United States lack standing to seek judicial review of any aspect of the administration or enforcement of the United States immigration laws.[11] This contention provided the rationale for

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454 U.S. 860 (1981) (class of all Mexican visa applicants can challenge State Department's allocation of visas issued to Mexican quota during transition period); Silva v. Bell, 605 F.2d 978 (7th Cir. 1979) (aliens outside United States as well as within entitled to judicial review of State Department's erroneous quota calculation and reallocation of visas).

[10] See United States v. Mendoza-Lopez, 481 U.S. 828, 837 & n.13 (1987); Wiedersperg v. INS, 896 F.2d 1179 (9th Cir. 1990); Zepeda-Melendez v. INS, 741 F.2d 285 (9th Cir. 1984); Estrada-Rosales v. INS, 645 F.2d 819 (9th Cir. 1981); Juarez v. INS, 732 F.2d 58 (6th Cir. 1984); Newton v. INS, 622 F.2d 1193 (3d Cir. 1980); Mendez v. INS, 563 F.2d 956 (9th Cir. 1977); but see Umanzor v. Lambert, 782 F.2d 1299 (5th Cir. 1986) (rejecting Mendez doctrine).

[11] Brief for Amicus Curiae FAIR at 16. That Brief also makes the novel contention that it would not be constitutional to grant Respondents standing, because "illegal immigrants" have no legally protected interests.

some of the cases that the Government cites in support of its preclusion argument, and the Eleventh Circuit in Haitian Refugee Center v. Baker, 953 F.2d 1498, 1507 & n.3 (11th Cir.), cert. denied. 112 S. Ct. 1245 (1992), regarded itself as bound by a prior Fifth Circuit standing decision. Amici will therefore confront directly the supposed rule that "the Administrative Procedure Act . . . does not authorize actions by aliens who are not physically present within the United States," Estrada v. Ahrens, 296 F.2d 690, 694 (5th Cir. 1961) (rejecting this rule).

The court of appeals found -- correctly, we submit -- that the repatriation of refugees to Haiti violated the nonrefoulement command in § 243(h) of the INA, 8 U.S.C. § 1253(h), which also applies on the high seas. Under the APA, standing depends on two elements, injury in fact and inclusion within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 153 (1970); Air Courier Conference of America v. American Postal Workers Union, 111 S. Ct. 913, 917-18 (1991). It is self-evident that forcible repatriation inflicts injury in fact. It is logically inescapable that nonresident refugees are among the intended beneficiaries of the nonrefoulement provision as construed by the court of appeals, and therefore within the zone of interests of that statute, as well as of the human rights treaty that the statute implements.

Nonetheless, it is suggested that Respondents lack

Id. at 21-23. Most of the fallacies on which this argument rests are apparent, but perhaps Amici should point out that United States law does not treat illegal entry by a conceded refugee coming directly from the persecuting country as a punishable crime -- to penalize such entry would violate Article 31.1 of the Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150. See Singh v. Nelson, 623 F. Supp. 545, 559-61 (S.D.N.Y. 1985). Far from being a crime, asylum-seeking is proclaimed as a human right by Article 14 of the Universal Declaration of Human Rights. U.N. G.A. Res. 217A, U.N. GAOR, 3rd Sess., Doc. A/810, at 71 (1948).

standing, on the basis of a supposed general rule that aliens outside the United States lack standing to sue. The answer to this contention is three-fold. First, there is no such general rule. Second, there is no rigid rule depriving nonresident aliens of standing in the immigration context. Third, to the extent that some courts have recognized or denied standing on prudential grounds for nonresident aliens seeking judicial review of particular immigration decisions, the prudential considerations support the standing of the Respondents in this case.

A. There is No General Rule Denying Standing to Sue in United States Courts to Aliens Outside the United States

The usual rule in this country has always been that aliens, including aliens who have never entered the United States, have standing to sue in the state and federal courts for violations of their rights. "Alien citizens, by the policy and practice of the courts of this country, are ordinarily permitted to resort to the courts for the redress of wrongs and the protection of their rights." Disconto Gesellschaft v. Umbreit, 208 U.S. 570, 578 (1908) (German bank seeking return of money brought into United States by fugitive).

Very early in the history of the common law, all aliens may have been treated as dangerous strangers ineligible to sue in the courts of the king, but this rule disappeared in England long before the United States became independent. Ex parte Kawato, 317 U.S. 69, 72-73 (1942). The Constitution explicitly contemplates aliens' access to the courts, and Article III confers federal jurisdiction over suits between aliens and citizens. The right of aliens to sue from abroad for protection of their interests was eloquently defended in Taylor v. Carpenter, 23 F. Cas. 744, 747-50 (C.C.D. Mass 1846) (No. 13,785) (Woodbury, Circuit Justice) (trademark infringement); see also Sardino v. Federal Reserve Bank of New York, 361 F.2d 106, 111 (2d Cir.) (Friendly, J.), cert. denied, 385 U.S. 898 (1966).

There is a traditional exception barring enemy aliens from suing during wartime, but this exception does not undercut the general presumption of nonresident aliens' standing. The "disabilities this country lays upon the alien who becomes also an enemy are imposed temporarily as an incident of war and not as an incident of alienage." Johnson v. Eisentrager, 339 U.S. 763, 772 (1950).[12] The scope of the exclusion is tailored to the necessities of war. Id. at 776.

The standing of aliens outside the United States is not limited to cases involving property inside the United States.[13] They are similarly entitled to sue for torts. See, e.g., McGovern v. Philadelphia & Reading Railway Co., 235 U.S. 389 (1914) (nonresident alien parents eligible beneficiaries under FELA in wrongful death action). Since torts are transitory actions, nonresident aliens may also sue in the United States for torts committed abroad, if they can obtain jurisdiction over the defendant here. See, e.g., In re Oil Spill by the Amoco Cadiz, 699 F.2d 909 (7th Cir.), cert. denied, 464 U.S. 864 (1983); In re Aircrash in Bali, 684 F.2d 1301 (9th Cir. 1982). Such an action might be dismissed on forum non conveniens grounds, but only if an alternative forum exists. See, e.g., Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254-55 & n.22 (1981).

Aliens outside the United States have standing to sue government defendants as well as private defendants. See, e.g., Zschernig v. Miller, 389 U.S. 429 (1968) (vindicating inheritance rights of aliens residing in Communist countries); Trojan Technologies, Inc. v. Pennsylvania, 916 F.2d 903 (3rd Cir. 1990) (foreign manufacturer challenging protectionist procurement policy), cert. denied, 111 S. Ct. 2814 (1991); Constructores

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[12] There are also dicta in Johnson v. Eisentrager suggesting a broader barrier to suits by overseas alien friends, but the literal implications of these dicta cannot be reconciled with the myriad of cases permitting nonresident aliens to sue to protect their rights.

[13] A contrary suggestion appears in then-Judge Burger's opinion in Kukatush Mining Corp. v. SEC, 309 F.2d 647, 650 (D.C. Cir. 1962), although he adds as a second exception immigration cases, where standing is more generously afforded to nonresident aliens.

Civiles de Centroamerica, S.A. v. Hannah, 459 F.2d 1183 (D.C. Cir. 1972) (foreign contractor challenging disqualification for bidding on overseas road contract). In some constitutional cases, courts have united their discussion of standing with the substantive question whether the overseas aliens enjoy the protection of the asserted constitutional right under the circumstances. See, e.g., DKT Memorial Fund Ltd. v. Agency for International Development, 887 F.2d 275, 283-86 (D.C. Cir. 1989); Cardenas v. Smith, 733 F.2d 909, 916-17 (D.C. Cir. 1984). This Court, however, did not even mention standing in Kleindienst v. Mandel, 408 U.S. 753 (1972), limiting itself to the observation that Mandel, an "unadmitted and nonresident alien" was merely a symbolic plaintiff because any constitutional challenge on his behalf to the immigration laws was clearly foreclosed on the merits. 408 U.S. at 762.

B. Courts Have Regulated the Access of Aliens Outside the United States to Judicial Review of Immigration Decisions Through Flexible Prudential Standing Rules

Just as there is no general rule denying nonresident aliens standing to sue in American courts, so is there no rigid rule denying aliens outside the United States standing to seek judicial review of immigration decisions. The Government relies on cases decided prior to 1970 that denied standing to overseas aliens for reasons incompatible with this Court's modernization of the APA standing rules in Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 153 (1970). Later cases suggest that aliens outside the United States may be barred from judicial review by a prudential standing rule whose outcome depends on a variety of factors.[14]

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[14] The Gordon and Mailman treatise is less helpful than usual in this context, because it lists inconsistent holdings without attempting a synthesis. 3 Gordon & Mailman § 81.01[3].

In the 1960's, some courts held that neither aliens outside the United States nor their employers or relatives inside the United States had standing to challenge administrative determinations that would prevent their immigration. See Cobb v. Murrell, 386 F.2d 947 (5th Cir. 1967) (labor certification); Braude v. Wirtz, 350 F.2d 702 (9th Cir. 1965) (labor certification); Montgomery v. Ffrench, 299 F.2d 730 (8th Cir. 1962) (petition for adopted child); but see Estrada v. Ahrens, 296 F.2d 690, 694-95 (5th Cir. 1961) (Wisdom, J.) (under APA nonresident aliens outside the United States are persons aggrieved and so entitled to judicial review, absent express preclusion). These opinions prominently featured the insistence that the entry of an alien from abroad was a privilege rather than a right, so that neither the alien nor the employer or relative suffered legal wrong when entry was denied. They also emphasized the rule, which this Court had already found to be superseded by the APA, that immigration decisions were not reviewable unless review was expressly authorized by statute.

The negative decisions of the 1960's were overtaken by a combination of developments in administrative law: this Court's broad interpretation of APA standing in Data Processing, its renewed emphasis on the presumption of reviewability in Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), its endorsement of pre-enforcement judicial review in Abbott Laboratories, and its narrow interpretation of the category of action "committed to agency discretion by law" in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971). Once "legal wrong" was no longer the key to standing, the characterization of immigration as a privilege lost its relevance to the standing of employers, relatives, and aliens themselves. See Secretary of Labor v. Farino, 490 F.2d 885, 889 (7th Cir. 1973) (Cobb and Braude "no longer tenable"); see also Pesikoff v. Secretary of Labor, 501 F.2d 757, 760 (D.C. Cir.), cert. denied, 419 U.S. 1038 (1974); Reddy, Inc. v. U.S. Dept. of Labor, 492 F.2d 538, 542-43 (5th Cir. 1974). Once pre-enforcement challenge to regulations became routine, visa regulations could be reviewed without disturbing the discretion of individual consuls or implicating the restrictions of § 106 on review of individual exclusion orders. See International

Union of Bricklayers v. Meese, 761 F.2d 798, 801 (D.C. Cir. 1985).

The surviving rationale for denying standing to aliens outside the United States was identified by the district court in Chinese American Civic Council v. Attorney General, 396 F. Supp. 1250 (D.D.C. 1975), aff'd on other grounds, 566 F.2d 321 (D.C. Cir. 1977). In less than a sentence, the court invoked "the policy reasons against affording a Federal forum for a person anywhere in the world challenging denial of entry or immigration status." 396 F. Supp. at 1251. In other words, the burden on the Government and the courts would be excessive if the courts entertained an unlimited category of suits by persons whose only connection to the United States was the desire to travel there.

The D.C. Circuit emphasized the limits of this prudential standing analysis in Jaimez-Revolla v. Bell, 598 F.2d 243 (D.C. Cir. 1979). The plaintiff in that case was not any random person, but a U.S. citizen's husband, who had previously been in the United States and had voluntarily returned to Mexico in order to seek permission to reenter. Because there was no evidence of congressional intent to preclude review, and because denial of standing would discourage regularization of status, the court considered it improper to invoke a prudential standing barrier.

The Seventh Circuit in Silva v. Bell, 605 F.2d 978, 984 (7th Cir. 1979), applied these "prudential principles" to grant standing to a class including "many thousands" of aliens who had never been in the United States. The only necessary connection between those aliens and the United States was their status as applicants for immigrant visas, which had been withheld because of misallocation. Nonetheless, the court found that both justice and judicial economy would be served by affording those aliens equal treatment with class members who were already present in the United States as nonimmigrants.

The INS also challenged an absent alien's standing to sue in Lesbian/Gay Freedom Day, Inc. v. U.S. INS, 541 F. Supp. 569, 574-76 (N.D. Cal. 1982), aff'd sub nom. Hill v. U.S. INS, 714 F.2d 1470 (9th Cir. 1983). The alien, a temporary visitor, had departed after prevailing at an exclusion hearing, but while the

INS was still appealing it to the BIA. The BIA later reversed the Immigration Judge's decision and entered an order of exclusion. When the alien sought judicial review, the INS contended that his departure deprived him of standing and mooted the case. The district court held that INA § 106(c) did not preclude review, because he had departed before, not after, the entry of the exclusion order. And it held that the INS's insistence on continuing the case after his departure entitled him to review of an order that would have negative consequences on his future trips.

The factors that lower courts have used in applying this prudential standing rule appear to include the following: the alien's connection to the United States; consequences of denying review for the alien; whether denial of review would frustrate the enjoyment of a right granted by Congress; whether limiting review to aliens inside the United States would create an incentive for aliens to enter or remain illegally; the extent to which initiative in producing the dispute was taken by the INS; the absence of express congressional preclusion; and the burden that review would place on the courts in terms of the number and complexity of cases. Other courts have permitted aliens outside the United States to challenge immigration decisions, with less analysis of the reasons. See cases cited in Part II(C) supra.

C. Prudential Standing Analysis Confirms Respondents' Standing to Seek Judicial Review

The circumstances of this case are not easily replicable. This case is not about denial of entry to the United States. It is about refoulement to Haiti of refugees captured by the United States on the high seas, regardless of their intended destination. The unique relationship that the United States government by its actions has established with these refugees affords them standing to challenge the legality of this exercise in deliberate refoulement.

1. Refugees Threatened with Capture and Return to Haiti Have Standing to Seek Judicial Review

Negative immigration decisions in ordinary cases do not place overseas aliens within the jurisdiction or custody of the United States. Consuls who deny visas do not arrest applicants in order to prevent them from migrating illegally, nor do they physically prevent them from emigrating to other countries.

Prudential standing limitations, based on a judicial concern not to entertain too many suits by distant aliens with insubstantial stakes, do not require dismissal of this action. Respondents ask this Court to determine whether, as the Second Circuit held, Congress has prohibited the Executive to reach out onto the high seas to capture and repatriate refugees. The interdiction program gives them no administrative remedies to exhaust, and they are not requesting judicial determination of their individual claims. They are fleeing a de facto government whose brutality has provoked condemnation from the United States and the world.

The factors employed by the lower courts in applying the prudential standing rule weigh in favor of Respondents' standing. The connection between Respondents and the United States is supplied by Petitioners' action in blockading the coast of Haiti to prevent their flight; this is affirmative interference with Respondents' liberty, not the passive receipt of an application for immigration benefits. As the Government concedes, there is no express congressional preclusion of judicial review. The consequences of permitting forced repatriation of refugees are severe, and denial of review would vitiate the right to nonrefoulement granted by Congress. Indeed, if the applicability of INA § 243(h) to U.S. government action on the high seas cannot be determined in this action, it is difficult to conceive of circumstances in which it could ever be determined. Nor would affording review in this case place an unacceptable burden on the federal courts, in the present or the future. The issue presented is purely one of law, it does not turn on individualized factors, and it requires no factfinding in foreign countries outside the control of the United States. The unprecedented nature of Petitioners' actions make this case easily distinguishable from the mass of immigration decisions that the prudential standing barrier is designed to keep out of the federal courts.

2. Respondents Who Were Wrongfully Returned From Guantanamo Have Standing to Seek Judicial Review

One subclass of Respondents has an even stronger basis in precedent for standing to sue: those refugees who were wrongfully repatriated from the Guantanamo Bay Naval Base, and need to flee Haiti again. Some class members, including a named plaintiff who appears in the relevant portion of the record under the designation "M. Bertrand," and another class member who appears under the designation "M. Remy,"[15] are not aliens who have never been presented to INS officials -- they were previously screened in by Petitioners and brought to Guantanamo, where they were detained for months. These Respondents then asserted the right to be advised by counsel in any further asylum interviewing, and in consequence were forcibly repatriated to Haiti, where they had to go into hiding. The Second Circuit has since affirmed a preliminary injunction against repatriation of screened-in plaintiffs while denying them access to their counsel, relying on the Due Process Clause of the Fifth Amendment. Haitian Centers Council, Inc. v. McNary (HCC I), 969 F.2d 1326 (2d Cir. 1992), petition for cert. filed, 61 U.S.L.W. 3287 (No. 92-528).

Several of the cases affording judicial review to aliens outside the United States emphasize the aliens' prior presence in the United States as a connecting factor that justifies affording them a forum. Moreover, the Mendez line of cases focuses specifically on aliens who have been deported from the United States irregularly. See note 10 supra. By its own terms, the Mendez doctrine involves only an implied exception to an express statutory prohibition on review of executed deportation orders.

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[15] See Pl. Ex. 84, J.A. __ (M. Remy); Pl. Ex. 85 (M. Bertrand), J.A. ____. The plight of these plaintiffs was called to the attention of the court of appeals in Brief for Appellants, Haitian Centers Council, Inc. v. McNary, No. 92-6144, at 43-44 & nn. 88, 89 (2d Cir. 1992). The actual names of these plaintiffs were placed under seal for their protection after their forced return to Haiti.

But it indicates a continuing connection between the United States and illegally removed aliens that would also justify an exception to a judicially created prudential standing barrier.

Space does not permit an adequate discussion in this brief of the legal and constitutional status of the Guantanamo Bay Naval Base. The issue was briefed before the Second Circuit, which considered the Due Process Clause of the Fifth Amendment likely to be applicable to aliens at Guantanamo in light of the United States' power of "complete jurisdiction and control" over the territory. HCC I, 969 F.2d at 1342-43. The INA does not include Guantanamo as part of its general definition of the "United States," see INA § 101(a)(38), 8 U.S.C. § 1101(a)(38), but does include it within the definition of the "United States" for purposes of INA § 215, 8 U.S.C. § 1185, which embraces "all territory and waters, continental or insular, subject to the jurisdiction of the United States."

Guantanamo is comparable to other strategic areas where the United States acquired complete jurisdiction and control without acquiring sovereignty over the underlying territory, such as the former Canal Zone in Panama, and the Trust Territory of the Pacific Islands.[16] During the period of United States jurisdiction over the Canal Zone, the courts treated it as equivalent

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[16] See Sedgwick W. Green, Applicability of American Laws to Overseas Areas Controlled by the United States, 68 Harv. L. Rev. 781, 792 (1955) (status of Guantanamo "in substance identical with that in the Canal Zone"); Law of the Sea and International Waterways: Canals, 1977 Digest of United States Practice in International Law § 7, at 593-94 (analogizing Canal Zone to Guantanamo). See also Huerta v. United States, 548 F.2d 343 (Ct. Cl.), cert. denied, 434 U.S. 828 (1977) (takings case involving alien's property on Guantanamo).

Guantanamo Bay Naval Base has a total area of over forty-five square miles, thirty-one of them on land. See Navy Office of Information, Statistical Information, U.S. Naval Base, Guantanamo Bay, Cuba (1985). Its land area is roughly the size of St. Thomas, V.I. (32 sq. mi.), and nearly half the size of the District of Columbia (70 sq. mi.).

to an unincorporated territory of the United States. See, e.g., Canal Zone v. Yanez P. (Pinto), 590 F.2d 1344 (5th Cir. 1979); Canal Zone v. Scott, 502 F.2d 566, 570 (5th Cir. 1974).

Months of residence in a refugee camp in such a territory, followed by forced repatriation, are a sufficient connection with the United States to make a refugee's fate a proper subject of judicial concern, notwithstanding the need for prudential standing rules to limit access to the federal courts. Bertrand and Remy are not any alien anywhere in the world. Petitioners initiated contact with them, prevented them from fleeing to any other country, and detained them in territory under the complete jurisdiction and control of the United States. Petitioners then forced them back to Haiti, and have announced that summary repatriation will follow if they try to flee again. The reasons for recognizing the standing of the Respondents in general apply with particular force to these Respondents. A federal court can determine the legality of Petitioners' actions at the request of such plaintiffs without becoming a forum for every disappointed visa applicant.

IV. PETITIONERS' VIOLATIONS OF THE INA ARE NOT UNREVIEWABLE FOREIGN POLICY OR MILITARY DETERMINATIONS OF THE PRESIDENT

The Government argues that the "nature of the administrative action involved" weighs against reviewability. Brief for Petitioners at 17. To the extent that the Government relies on the implications of immigration enforcement for foreign relations, much of this Court's body of precedents reviewing action by immigration officials refutes this contention. See, e.g., INS v. Doherty, 112 S. Ct. 719 (1992) (reviewing deportation of PIRA member to United Kingdom); INS v. Elias-Zacarias, 112 S. Ct. 812 (1992) (reviewing likelihood of persecution in Guatemala); Jean v. Nelson, 472 U.S. 846 (1985) (reviewing discrimination against Haitians in parole determinations).

The fact that §§ 212(f) and 215 of the INA, 8 U.S.C. §§ 1182(f), 1185, grant the President broad discretion to impose restrictions on the entry of aliens does not militate against the

reviewability of the Petitioners' actions. Respondents do not challenge a restriction on entry, but rather Petitioners' practice of unlawful forced repatriation of refugees captured on the high seas.

Nor do Respondents challenge a Presidential determination that entry of undocumented aliens would be detrimental to the interests of the United States. Indeed, as the Office of Legal Counsel recognized when the interdiction program was first adopted, suspension of entry under § 212(f) is wholly redundant, since it is being applied to aliens who are already excludable for lack of visas. Proposed Interdiction of Haitian Flag Vessels, 5 Op. Off. Legal Counsel 242, 244 (1981).

Even if Respondents were challenging a restriction on entry, conflicts between exercise of authority under §§ 212(f) and 215 and requirements imposed elsewhere by statute are not unreviewable. As the legislative history of the 1952 Act states, and as a comparison of the statutory language confirms, §§ 212(f) and 215 reenact the authority granted by the Passport Act of May 22, 1918, 55 Stat. 252, as amended, formerly codified at 22 U.S.C. § 223.[17] Case law between 1952 and 1981 is unavailable because, as the Office of Legal Counsel observed, "Neither this Office nor the Immigration and Naturalization Service (INS) is aware of any time when the power granted by this section, added in 1952, has been used." 5 Op. Off. Legal Counsel 242, 244 n.5 (1981).[18] Cases under the predecessor provision, however, did

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[17] See H.R. Rep. No. 1365, 82d Cong., 2d Sess. 53 (1952), reprinted in [1952] U.S. Code, Cong. & Ad. News 1708. The original restriction to times of war or declared national emergency was repealed in 1978. Pub. L. 95-426, § 707(a), 92 Stat. 992.

[18] Section 212(f) has been invoked subsequent to 1981 on four other occasions. Presidential Proclamation No. 5377, 50 Fed. Reg. 41,329 (1985); Presidential Proclamation No. 5517, 51 Fed. Reg. 30,470 (1986); Presidential Proclamation No. 5829, 53 Fed. Reg. 22,289 (1988); Presidential Proclamation No. 5887, 53 Fed. Reg. 43,185 (1988). Unlike the Haitian interdiction program, none of these Proclamations did anything other than declare ineligible for entry certain categories of aliens who might otherwise have been admissible.

measure restrictions adopted pursuant to its authority against congressional limitations of executive power. See United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544-47 (1950); Johnson v. Keating ex rel. Tarantino, 17 F.2d 50 (1st Cir. 1926). And the Seventh Circuit has held that a departure control order issued against a child under § 215 violated the constitutional rights of his parents, who had already returned to the Soviet Union. Polovchak v. Meese, 774 F.2d 731 (7th Cir. 1985).

Moreover, the Petitioners are engaging in unlawful repatriation on their own authority, not under the direction of the President's Order. That Order superseded the express requirement of nonreturn of refugees contained in the original Executive Order establishing the Haitian interdiction program, but it purports to leaves refugee screening to Petitioners' discretion.[19] This case is therefore entirely unlike Franklin v. Massachusetts, 112 S. Ct. 2767 (1992), where the Court denied the availability of APA review of a discretionary function carried out directly by the President, or United States v. George S. Bush & Co., 310 U.S. 371 (1940), a pre-APA case in which the Court denied the availability of review of the President's exercise of judgment in proclaiming a tariff, so long as "the President acted in full conformity with the statute." 310 U.S. at 380.

Nor does this case become one of a military nature merely because the President has involved the Coast Guard in the enforcement of the immigration laws. This Court has long recognized the regulation of immigration as a plenary power of Congress, not of the President. Indeed, some of the seminal precedents specifically characterize regulation of immigration as regulation of foreign commerce. See Head Money Cases, 112 U.S. 581, 591 (1884); Henderson v. Mayor of New York, 95

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[19] Petitioners assert that the Coast Guard has instructed its officers to apply an "immediate and exceptionally grave physical danger" standard for giving temporary refuge. Brief for Petitioners at 7 n.5. While this heightened standard is clearly inconsistent with Petitioners' statutory and treaty obligations, it underscores the fact that the President's order does not forbid the Petitioners to comply with § 243(h).

U.S. 259, 270-71 (1876); Passenger Cases, 48 U.S. (7 How.) 283, 405 (1849) (opinion of McLean, J.). Nowhere has this Court suggested that the President has a superior power over immigration that authorizes him to set aside statutory restrictions. A fortiori, the President cannot delegate to Petitioners the authority to violate the statute. See also 14 U.S.C. § 89(b) (Coast Guard subject to same limits as other law enforcement agents).

CONCLUSION

For the foregoing reasons, this Court should conclude that Respondents had standing to seek judicial review of Petitioners' actions, and should reach the merits of the case. While Amici have only presented argument relating to the issue of the availability of judicial review, Amici believe that the decision of the United States Court of Appeals for the Second Circuit was correct on the merits as well. Accordingly, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Lory D. Rosenberg*
American Immigration Law Foundation
Legal Action Center
1400 Eye Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 371-9377

Gerald L. Neuman
435 West 116th Street
New York, N.Y. 10027
(212) 854-2550

*Counsel of Record